Supreme Court, U.S.
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No. 08- 08-57

IN THE

Supreme Court of the United States

SHAHZAD ANWAR,

Petitioner,

v.

UNITED STATES CITIZENSHIP & IMMIGRATION SERVICES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ROBERT M. COHEN
181 Wood Dale Drive
Ballston Lake, New York 12019
(518) 877-5552

Attorney for Petitioner

216882

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED FOR REVIEW

Is it permissible to deny a request for adjustment of status under the Immigration and Nationality Act when the U.S. Government fails to conduct a hearing before an Immigration Judge in accordance with the evidentiary requirements of 8 U.S.C. § 1361?

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28 U.S.C. § 1254(1) 1

Petitioner herein respectfully petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, dated April 11, 2008, is not officially reported, but can be found online at 2008 WL 171135 and is reprinted in Appendix A at pages 1a-3a. The order of the Board of Immigration Appeals is not reported and is reprinted in Appendix B at pages 4a-6a. The decision of the Immigration Judge is not reported and is reprinted in Appendix C at pages 7a-12a.

STATEMENT OF JURISDICTION

The order of the United States Court of Appeals for the Second Circuit is dated April 11, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

8 U.S.C. § 1255(i) provides, in relevant part:

> (i) Adjustment of status of certain aliens physically present in United States
>
> (1) Notwithstanding the provisions of subsections (a) and (c) of this section, an alien physically present in the United States—

. . .

> may apply to the Attorney General for the adjustment of his or her status to that of an alien lawfully admitted for permanent residence. . . .

8 U.S.C. § 1361 provides:

> . . . In any removal proceeding under chapter 4 against any person, the burden of proof shall be upon such person to show the time, place, and manner of his entry into the United States, but in presenting such proof he shall be entitled to the production of his visa or other entry document, if any, and of any other documents and records, not considered by the Attorney General to be confidential, pertaining to such entry in the custody of the Service.

STATEMENT OF THE CASE

A. Introduction

This case concerns the denial of an alien's application for an adjustment of status pursuant to 8 U.S.C. § 1255(i), together with a request for waiver of inadmissibility, and whether that application could be properly denied when the Government failed to follow the procedural requirements set for in 8 U.S.C. § 1361.

B. Statement of the Facts, Legal Background, and Proceedings Below

Petitioner is a 45-year-old native of Pakistan. He is married and has four children, all born in the United States. Petitioner entered the United States in November of 1990 on a visitor's visa. Subsequently he married a United States citizen, Ruby Jean Smith. Petitioner and Ruby Jean were later divorced. He has subsequently remarried.

On September 15, 2001, a Notice to Appear was mailed to Mr. Anwar requesting that he appear before an Immigration Judge. Petitioner was charged with remaining in the United States beyond May 21, 1999 without authorization from the Immigration and Naturalization Service. The matter was adjourned several times. Mr. Anwar filed a Form I-485, Application for Adjustment of Status, on January 17, 2003, based on the approved Form I-140.

The matter came on for trial before Hon. Annette S. Elstein, I.J., on October 14, 2004. Judge Elstein rendered an oral decision in court, holding petitioner ineligible for adjustment, finding him removable, and granting his request for voluntary departure.

Petitioner appealed to the Board of Immigration Appeals, which found that the Immigration Judge had not erred in ruling that petitioner failed to meet his burden of demonstrating his eligibility for adjustment of status.

Petitioner sought review in the U.S. Court of Appeals for the Second Circuit. The Court of Appeals rejected Mr. Anwar's argument that at trial, his visa was not in evidence in violation of 8 U.S.C. § 1361. The Court of Appeals excused that failure of proof by saying that the Department of Homeland Security submitted a copy of Mr. Anwar's visa on July 2, 2003, well before the Immigration Judge rendered her decision.

The Court of Appeals did not find that a copy of the visa had been admitted into evidence at the hearing before Immigration Judge Elstein. It effectively conceded that the Government had failed to comply with 8 U.S.C. § 1361, but excused that failure, finding that the visa was immaterial to petitioner's case.

Petitioner respectfully submits that, when a statute requires, in plain language, that the visa be produced and placed in evidence by the Government, the Government is required to comply with the statute and, when there is a failure of compliance by the Government, the Government cannot successfully urge that the petitioner has failed to comply with applicable statutes and is subject to deportation or removal from the country.

ARGUMENT

REASONS FOR GRANTING THE PETITION

Petitioner, like most who travel to this country and would wish to live here, sought a better life in this country than in the country of his birth. He came to the United States and found that this is where he wanted to make his life. He has made a home here, has worked, married, raised a family. If respondent is to properly find that petitioner must leave the United States, it must do so properly, in full accordance with the law.

This Court has frequently recalled Chief Justice Marshall's observation in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163, 2 L.Ed. 60 (1803), that our Government "has been emphatically termed a government of laws, and not of men." *See, e.g., Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 66, 112 S.Ct. 1028, 117 L.Ed.2d 208 (1992).

The United States should obey its own laws, strictly and to the letter, especially when something as important as immigration status and possible deportation are involved.

Petitioner had applied for adjustment of his status, as provided for by law, to permit him to stay in this country and continue to work, be a productive member of our society, and father to his children who were born in the United States. Absent the finding that he was inadmissible under the Immigration and Naturalization Act, and therefor his status could not be adjusted under 8 U.S.C. § 1255(i), his status could have been adjusted

and he could be permitted to remain lawfully in the United States. The hearing at which petitioner was found inadmissible was conducted in violation of 8 U.S.C. § 1361.

The record shows that petitioner has four children, born in the United States. If he is deported to Pakistan and they must follow him, they will be taken to a society that is far different than found in the United States, one for which they will be not prepared. That is a society which petitioner sought to leave for good after he came to this country. Even a casual reading of the international news reflects the violence and upheaval found in Pakistan today, where car bombings and other terror activities afflict the population, something that is fortunately absent here.

If petitioner is to be told he must go back to Pakistan, with the corresponding uprooting of his family, it should be done only after the United States has fully complied with its own statutes and procedures.

The Board of Immigration Appeals and the Court of Appeals for the Second Circuit did not disagree with petitioner's contention that the visa was not admitted into evidence at the time of his hearing before the Immigration Judge. The failure to place the visa into evidence was a violation of 8 U.S.C. § 1361. The Board of Immigration Appeals and the Second Circuit Court of Appeals have sanctioned a departure from the requirements of law. Such a departure should call for review by this Court in an exercise of this Court's supervisory power. Review should be granted to correct the Court of Appeals' approval of the deviation from the clear mandate of the statute.

PETITIONER SEEKS A STAY OF REMOVAL PENDING CONSIDERATION OF THIS PETITION FOR A WRIT OF CERTIORARI.

This Court should also grant petitioner a stay of removal granting consideration of his petition for a writ of certiorari. Mr. Anwar sought a stay of deportation or removal from the Second Circuit Court of Appeals, which dismissed that request as moot when it denied the petition for review. Mr. Anwar should receive a stay of removal pending consideration of the present petition for a writ of certiorari, because (1) he will suffer irreparable harm without a stay, as he may be deported at any time, (2) his claim is sufficiently meritorious as to create a reasonable probability that certiorari will be granted in this case, and (3) it is likely that this Court, granting certiorari, will reverse the order of the Court of Appeals.

CONCLUSION

For the reasons stated above, petitioner should be granted a stay of removal or deportation and a writ of certiorari should be granted.

Respectfully submitted,

ROBERT M. COHEN
181 Wood Dale Drive
Ballston Lake, New York 12019
(518) 877-5552

Attorney for Petitioner

July 2008

APPENDIX

APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED APRIL 11, 2008

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 06-5395-ag

SHAHZAD ANWAR,

Petitioner,

-v.-

UNITED STATES CITIZENSHIP & IMMIGRATION SERVICES,

Respondent.

PRESENT:

HON. PIERRE N. LEVAL,
HON. GUIDO CALABRESI,
HON. RICHARD C. WESLEY,
Circuit Judges.

SUMMARY ORDER

Petitioner Shahzad Anwar seeks review of an October 23, 2006 order of the Board of Immigration Appeals ("BIA") affirming Immigration Judge ("IJ") Annette S. Elstein's October 14, 2004 decision to deny his application for adjustment of status, along with his

request for a waiver of inadmissiblity. *In re Shahzad Anwar*, No. A76 191 827 (B.I.A. Oct. 23, 2006), *aff'g* No. A76 191 827 (Immig. Ct. N.Y. City Oct. 14, 2004). We assume the parties' familiarity with the procedural history, facts, and relevant issues on appeal.

Anwar contends that the BIA erred in upholding the decision of the IJ because, when determining whether he was admissible under the Immigration and Nationality Act, and therefore able to adjust his status, *see* 8 U.S.C. § 1255(i), the IJ failed to consider his 1990 nonimmigrant visa and the documents that he supplied to the Immigration and Naturalization Service in connection with that visa. According to Anwar, these crucial materials were not admitted into evidence at the time of his hearing before the IJ, and as a result, he was prevented from establishing that he is eligible for the relief he seeks. We are not persuaded.

The record shows that the Department of Homeland Security ("DHS") submitted a copy of Anwar's nonimmigrant visa on July 2, 2003, well before the IJ rendered her decision. And in any case, that documentation was immaterial to Anwar's case. While the time, place, and manner of an alien's entry into the United States is relevant in many removal proceedings, *see* 8 U.S.C. § 1361, DHS never contended that Anwar was removable for entering without valid documentation; rather, it charged that he was removable for having overstayed his nonimmigrant visa. Further, that documentation had no bearing on Anwar's eligibility for adjustment of status. The IJ found Anwar inadmissible

and therefore ineligible for adjustment of status because he admitted to fraud in connection with a 1993 application for adjustment of status, *see* 8 U.S.C. § 1182(a)(6)(C), not because he entered the country illegally.

As for the IJ's related finding-that a waiver of inadmissiblity under INA section 237(a)(1)(H), 8 U.S.C. § 1227(a)(1)(H), was "inapplicable and irrelevant to [Anwar's] request for adjustment of status"—Anwar's submission, construed liberally, *see Triestman v.. Fed. Bureau of Prisons*, 470 F.3d 471, 474 (2d Cir.2006), asserts no challenge to it. Anwar neither mentions waivers of admissibility nor discusses the specifics of his eligibility to adjust his status. Accordingly, we treat as waived any arguments that could have been raised with regards to the IJ's denial of Anwar's request for a section 237(a)(1)(H) waiver. *See Yueqing Zhang v. Gonzales*, 426 F.3d 540, 541 n. 1, 545 n. 7 (2d Cir.2005).

We have considered all of the petitioner's arguments and we find them without merit. Accordingly, the petition for review is DENIED. The pending motion for a stay of deportation/removal is DISMISSED as moot.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk of the Court

By: s/ Frank Perry

APPENDIX B — ORDER OF THE U.S. DEPARTMENT OF JUSTICE DATED OCTOBER 23, 2006

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

File: A76 191 827 - New York

In re: SHAHZAD ANWAR

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Suresh H. Dalal, Esquire

CHARGE:

Notice: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(l)(B)] – In the United States in violation of law

Lodged: Sec. 237(a)(I)(A), I&N Act [8 U.S.C. § 1227(a)(1)(A)] – Inadmissible at time of entry or adjustment of status under section 212(a)(6)(C)(i), I&N Act [8 U.S.C. § 1182(a)(6)(C)(i)] – Fraud or willful misrepresentation of a material fact (withdrawn)

APPLICATION: Adjustment of status

Appendix B

ORDER:

PER CURIAM. The respondent appeals from the Immigration Judge's October 14, 2004, decision insofar as it denied his application for adjustment of status. The respondent's appeal will be dismissed.

The respondent, who conceded that he is removable under section 237(a)(1)(B) of the Immigration and Nationality Act, has the burden of establishing his eligibility for relief from removal. *See* section 291 of the Act; *see also* 8 C.F.R. § 1240.8(d). The Department of Homeland Security (DHS) lodged a "fraud" charge against the respondent under section 237(a)(1)(A) of the Act, but withdrew the charge because the respondent had been admitted to the United States in 1990 and his acknowledged fraud or willful misrepresentation had not occurred "at the time of entry or adjustment of status." *See* Tr. at 34, 46-47. The respondent argues on appeal that he "is entitled to adjustment of status as fraud is not alleged against him." However, in seeking adjustment of status, it is the respondent's burden to demonstrate that he is inadmissible to this country, and the section 212(a)(6)(C) admissibility ground is not limited to fraud or willful misrepresentations "at the time of entry or adjustment of status." We find no error in the Immigration Judge's ruling that the respondent has failed to meet his burden of demonstrating his eligibility for adjustment of status.

Accordingly, the respondent's appeal is dismissed.

Appendix B

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the respondent is permitted to voluntarily depart from the United States, without expense to the Government, within 60 days from the date of this order or any extension beyond that time as may be granted by the Department of Homeland Security (DHS). *See* section 240B(b) of the Immigration and Nationality Act; 8 C.F.R. §§ 1240.26(c), (f). In the event the respondent fails to so depart, the respondent shall be removed as provided in the Immigration Judge's order.

NOTICE: If the respondent fails to depart the United States within the time period specified, or any extensions granted by the DHS, the respondent shall be subject to a civil penalty of not less than $1,000 and not more than $5,000, and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Immigration and Nationality Act. *See* section 240B(d) of the Act.

s/ [illegible]
FOR THE BOARD

APPENDIX C — ORAL DECISION OF THE IMMIGRATION JUDGE OF THE UNITED STATES DEPARTMENT OF JUSTICE DATED OCTOBER 14, 2004

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
New York, New York

October 14, 2004

File No.: A 76 191 827

IN REMOVAL PROCEEDINGS

In the Matter of

SHAHZAD ANWAR

Respondent

CHARGE:	Immigration and Nationality Act Section 237(a) (1) (B) – non-immigrant who remained in the United States for a time longer than permitted.
APPLICATIONS:	Immigration and Nationality Act Section 245 – adjustment of status upon a waiver of removability; Immigration and Nationality Act Section 240B – voluntary departure in the alternative.

Appendix C

ON BEHALF OF RESPONDENT:

Suresh Dalal, Esquire
200 Middlesex Turnpike
Suite 106
Iselin, NJ 08830-2033

ON BEHALF OF DHS:

Meagen Sleeper
Esquire

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 41-year-old married male, native and citizen of Pakistan, who was admitted to the United States at New York, New York on or about November 23, 1990 as a B-2 visitor for pleasure with authorization to remain until May 22, 1991 and who remained thereafter without authority. Consequently, the respondent was issued a Notice to Appear dated September 15, 2000 charging him with removability under Section 237(a) (1) (B) of the Immigration and Nationality Act. At the commencement of proceedings before me on October 15, 2002, the respondent with his attorney at that time conceded service of the Notice to Appear, Exhibit No. 1, admitted the truth of the factual allegations contained therein, and conceded removability as charged, thus establishing removability by clear and convincing evidence.

There have been a series of representations by various attorneys herein with various requests for relief.

Appendix C

The respondent has a rather lengthy history of applications for various forms of relief including at least two prior I-130 petitions by spouses from whom he is now divorced as well as an adjustment of status application made in 1993, all of which were denied.

He is now married since April of 2004 to a woman who has apparently no legal status. He has indicated that he has four United States citizen children. The application most recently before this Court is for adjustment of status on an approved labor certification and an I-140 petition. *See* Exhibit No 10.

The adjustment of status application has been opposed by the Government on the claim that the respondent is inadmissible under that petition because of past fraud or misrepresentation, in particular, in connection with a previous immigration petition filed under another A number, 72 361 752.

The Government at one time served the respondent with a Form I-261 claiming that the respondent had sought to procure an Immigration benefit by fraud or willful misrepresentation. *See* Exhibit No. 7. And at first, the respondent admitted the truth of the allegations therein. He has also conceded such misrepresentation in his Form I-601, seeking a waiver of such fraud. *See* Exhibit No. 9. The Government has, however, withdrawn the Form I-261, because the alleged misrepresentation or fraud was not committed in connection with an entry or actual adjustment.

Appendix C

At first, the respondent filed the I-601, Exhibit No. 9, seeking a waiver under Section 212(i) of the INA on the basis that he had four citizen children. The respondent's attorney later agreed that such a waiver was not available under Section 212(i) and withdrew that basis for his application because it is available only to the spouse or son or daughter of a United States citizen or lawful permanent resident, and the respondent does not fit those categories. The respondent then raised the proposition that he was entitled to a waiver under Section 237(a) (1) (H) of the Act. The respondent testified that at the time of his entry as a B-2 in 1991 when he applied for entry as a visitor for pleasure, he in effect misrepresented his intention because he really intended to stay permanently. This self-serving and actually unproved claim was made because Section 237 (a) (1) (H) is a waiver available to the parent, among other things, of a United States citizen. However, that waiver relates to removability on the ground of inadmissibility "at the time of admissions as aliens." It does not refer to later misrepresentation and, apparently, has no relationship to admissibility as a non-immigrant. Be that as it may, the waiver only relates to deportations based on inadmissibility resulting from fraud or misrepresentation as to admissibility at the time of admission. Even if the Court were to consider his claim as stated and grant a waiver under Section 237 (a) (1) (H), it would not assist this respondent in his application for adjustment of status. The misrepresentations alleged by the Government and admitted by him deal with willful misrepresentations in requests for adjustment of status in 1993 and 1994, in which he

claimed falsely that he had continuously resided in the United States since before 1972 and similar misrepresentation on an employment authorization application in 1993 and 1994, and in his adjustment form, Form I-485. This has nothing to do with his admissibility at the only time he was admitted which was a B-2 in 1990.

These misrepresentations are a bar to his adjustment of status on his current I-140 petition. The Statute clearly relates only to inadmissibility at entry, deals in the past tense, and cannot relate to the material frauds which were committed by him after his admission.

The Court must deny his request for relief under 237 (a) (1) (H) as not being based in fact and as having no relationship to his present efforts to seek adjustment of status. The Court sees no relief in the form of a waiver available to him at the present time for the misrepresentations which render him ineligible for adjustment of status on his I-140. This Court cannot adjust his status because he is inadmissible in a manner which cannot be waived and for which there appears to be no waiver available. The following order must therefore be entered.

The respondent's request for a waiver under Section 237 (a) (1) (H) is denied as inapplicable and irrelevant to his request for adjustment of status.

His request for adjustment of status under Section 245 of the Act is denied because he is ineligible for that relief because of past serious and frequent misrepresentation.

Appendix C

The other relief requested by the respondent appears to be that of voluntary departure. Despite his series of serious misrepresentations and/or fraud in the past, it would appear that those acts did occur more than five years ago. The Court must consider that he has been here a lengthy period of time and does have substantial ties and, therefore, is inclined in the exercise of discretion to grant the limited relief of voluntary departure for which he appears to be statutorily eligible. The following order will therefore be entered.

IT IS HEREBY ORDERED that the respondent's application for adjustment of status under Section 245 of the Act is denied.

IT IS FURTHER ORDERED that the respondent's application for a waiver under Section 237 (a) (1) (H) of the Act is denied.

IT IS FURTHER ORDERED that the respondent's application for voluntary departure is granted until December 13, 2004 upon his posting a bond in the amount of $500 by October 21, 2004. If the respondent fails to comply with both of those conditions, that privilege will be withdrawn without any further notice or proceedings and an alternate order of removal to Pakistan be entered without any further notice or proceedings.

s/ Annette S. Elstein
ANNETTE S. ELSTEIN
Immigration Judge

APPENDIX D—RELEVANT STATUTES

8 U.S.C. § 1255(i)

(i) Adjustment of status of certain aliens physically present in United States

(1) Notwithstanding the provisions of subsections (a) and (c) of this section, an alien physically present in the United States—

(A) who—

(i) entered the United States without inspection; or

(ii) is within one of the classes enumerated in subsection (c) of this section;

(B) who is the beneficiary (including a spouse or child of the principal alien, if eligible to receive a visa under section 1153(d) of this title) of—

(i) a petition for classification under section 1154 of this title that was filed with the Attorney General on or before April 30, 2001; or

(ii) an application for a labor certification under section 1182(a)(5)(A) of this title that was filed pursuant to the regulations of the Secretary of Labor on or before such date; and

(C) who, in the case of a beneficiary of a petition for classification, or an application for labor certification, described in subparagraph (B) that was filed after January 14, 1998, is physically present in the United States on December 21, 2000;

may apply to the Attorney General for the adjustment of his or her status to that of an alien lawfully admitted for permanent residence. The Attorney General may accept such application only if the alien remits with such application a sum equalling $1,000 as of the date of receipt of the application, but such sum shall not be required from a child under the age of seventeen, or an alien who is the spouse or unmarried child of an individual who obtained temporary or permanent resident status under section 1160 or 1255a of this title or section 202 of the Immigration Reform and Control Act of 1986 at any date, who—

(i) as of May 5, 1988, was the unmarried child or spouse of the individual who obtained temporary or permanent resident status under section 1160 or 1255a of this title or section 202 of the Immigration Reform and Control Act of 1986;

(ii) entered the United States before May 5, 1988, resided in the United States on May 5, 1988, and is not a lawful permanent resident; and

(iii) applied for benefits under section 301(a) of the Immigration Act of 1990. The sum specified herein shall be in addition to the fee normally required for the processing of an application under this section.

(2) Upon receipt of such an application and the sum hereby required, the Attorney General may adjust the status of the alien to that of an alien lawfully admitted for permanent residence if—

(A) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence; and

(B) an immigrant visa is immediately available to the alien at the time the application is filed.

(3)(A) The portion of each application fee (not to exceed $200) that the Attorney General determines is required to process an application under this section and is remitted to the Attorney General pursuant to paragraphs (1) and (2) of this subsection shall be disposed of by the Attorney General as provided in subsections (m), (n), and (o) of section 1356 of this title.

(B) Any remaining portion of such fees remitted under such paragraphs shall be deposited by the Attorney General into the Breached Bond/Detention Fund established under section 1356(r) of this title, except that in the case of fees attributable to applications for a beneficiary with respect to whom a petition for classification, or an application for labor certification, described in paragraph (1)(B) was filed after January 14, 1998, one-half of such remaining portion shall be deposited by the Attorney General into the Immigration Examinations Fee Account established under section 1356(m) of this title.

Appendix D

8 U.S.C.S. § 1361

§ 1361. Burden of proof upon alien

Whenever any person makes application for a visa or any other document required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not inadmissible under any provision of this Act, and, if an alien, that he is entitled to the nonimmigrant, immigrant, special immigrant, immediate relative, or refugee status claimed, as the case may be. If such person fails to establish to the satisfaction of the consular officer that he is eligible to receive a visa or other document required for entry, no visa or other document required for entry shall be issued to such person, nor shall such person be admitted to the United States unless he establishes to the satisfaction of the Attorney General that he is not inadmissible under any provision of this Act. In any removal proceeding under chapter 4 [*8 USCS §§ 1221* et seq.] against any person, the burden of proof shall be upon such person to show the time, place, and manner of his entry into the United States, but in presenting such proof he shall be entitled to the production of his visa or other entry document, if any, and of any other documents and records, not considered by the Attorney General to be confidential, pertaining to such entry in the custody of the Service. If such burden of proof is not sustained, such person shall be presumed to be in the United States in violation of law.